IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DAVID WALLACE CROFT and SHANNON KRISTINE CROFT, AS PARENTS AND NEXT FRIEND OF THEIR MINOR CHILDREN *Plaintiffs,*	§ § § § § § §	
	§	Civil Action No. 3:06 CV-9434M
v.	§ §	
RICK PERRY, GOVERNOR OF THE STATE OF TEXAS AND CARROLLTON-FARMERS BRANCH INDEPENDENT SCHOOL DISTRICT *Defendants.*	§ § § § § §	

BRIEF IN SUPPORT OF RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT RICK PERRY AND BRIEF IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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Defendant Governor Rick Perry agrees with Plaintiffs that this case is ripe for summary judgment. "[T]here is no genuine issue as to any material fact, and . . . [the court should enter] judgment as a matter of law. FED. R. CIV. P. 56(c). The constitutionality of Texas Education Code §25.082(d) is an issue of pure law, governed by multiple Supreme Court precedents, and it is ideal for resolution without development of further facts. The plaintiffs, however, are incorrect in their assessment of that law and of the effect of Supreme Court precedent on this case. Accordingly, the court should grant summary judgment not for the Plaintiffs, but for defendant Governor Rick Perry.

SUMMARY OF ARGUMENT

Requiring students to observe sixty seconds of silence each morning following the pledges of allegiance to the United States and Texas flags promotes thoughtful contemplation, patriotism, and individual religious freedom. These three secular purposes jointly and severally undergird Texas Education Code §25.082(d), each sufficient to satisfy the first prong of the tripartite test articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). Plaintiffs have not met their burden to prove the statute was motivated entirely by religious considerations. These legitimate secular purposes—and, indeed, the practice itself—also foster the neutrality toward religion mandated by the Constitution. And that principle flows, not from just one line of cases or another or one particular clause or another, but from the Free Exercise Clause *and* the Establishment Clause *and* the Free Speech Clause *and* the Equal Protection Clause. These four clauses converge to yield a single principle, and that principle controls this case: Government may not discriminate in favor of religion, or in favor of one religion over another, and—critically—it cannot discriminate against religion. Moreover, the minute-of-silence statute neither advances nor endorses nor coerces religion or a religious practice. Accordingly, the plaintiffs' motion for partial summary judgment should be denied and the defendant's cross-motion for summary judgment should be granted.

STATEMENT OF FACTS

In 2003, the Texas Legislature revised its Education Code to mandate that local school boards require daily recitation of the pledges to the United States and Texas flags in every public school. TEX. EDUC. CODE §25.082(b)(1)-(2) (Vernon's 2006) (App. at 1). Upon the written request of a student's parent or guardian, he or she may be excused from the recitation of the pledges. *Id.* §25.082(c). Following the pledge, students must "observ[e] . . . one minute of silence . . . . During the one-minute period, each student may, as the student chooses, reflect, pray, meditate, or engage

in any other silent activity that is not likely to interfere with or distract another student." *Id.* §25.082(d). The teachers "shall ensure that each of those students remains silent and does not act in a manner that is likely to interfere with or distract another student." *Id.*

Before this statute was enacted, school boards already had the power—indeed, the express legislative permission—to implement the moment of silence provided by §25.082(d).[1] The 2003 statute made two primary changes: (1) it made the moment of silence mandatory rather than merely permissive, and (2) it added the word "pray" to the list of options (along with "reflect" or "meditate") that an individual student may choose to engage in during the moment of silence. Making the moment of silence a part of mandatory daily pledge recitation established a uniform practice among the school districts in contrast to the prior differing practices among different school districts.[2]

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1. The previous incarnation of the statute read: "(a) A school day shall be at least seven hours each day, including intermissions and recesses. (b) A school district may provide for a period of silence at the beginning of the first class of each school day during which a student may reflect or meditate." Act of May 27, 1995, 74th Leg., R.S., ch. 260, § 1, 1995 Tex. Gen. Laws 2207 (App. at 4).

2. As Senator Wentworth, the Senate bill sponsor, noted before the Senate Committee on Education:

> Now, as you may know, the current law in Texas is, on a local basis, independent school districts have the right now, under current law, to allow sixty seconds of meditation or reflection by students. And some school districts do engage in that or others do not. . . . Senate Bill 83, makes it statewide and mandatory and adds the word "prayer" to the three things that are allowed under the law.
> . . .
>
> [T]he majority of independent school districts, to the best of my knowledge, have not adopted the permissive minute of silence. So thousands of kids are not given the opportunity, at least the opportunity. And, and this I do want to emphasize this is not, this is not, for purposes of legislative intent, this is not a prayer bill. It's an opportunity to give people, a chance to spend sixty seconds on a daily basis to reflect or meditate or pray.

Statement of Sen. Wentworth, *Hearings on Tex. S.B. 83 Before the Senate Comm. on Educ.*, 78th Leg., R.S. (Feb. 11, 2003) (audiotapes available from Senate Staff Services Office) (App. at 6-7).

And House sponsor Representative Branch observed:

Establishing a uniform practice comports with a key goal articulated in the Education Code: "A primary purpose of the public school curriculum is to prepare thoughtful, active citizens who understand the importance of patriotism and can function productively in a free enterprise society with appreciation for the basic democratic values of our state and national heritage." TEX. EDUC. CODE §28.002(h) (Vernon's 2006). As bill sponsor Representative Dan Branch noted, this bill "sets in the Education Code . . . the requirements that core values of our nation-state be practiced on a daily basis." *Hearings on Tex. H.B. 793 Before the House Comm. on Pub. Educ.*, 78th Leg., R.S. (Apr. 1, 2003) (Statement of Rep. Branch) (audiotapes available from House Video/Audio Services Office) (App. at 9).

The Texas Education Agency has promulgated guidelines informing school administrators how to implement this statute. Letter from Shirley Neeley, Commissioner, Tex. Educ. Agency, To School Administrators (Oct. 10, 2006) (on file with TEA) [*hereinafter* TEA Guidelines] (App. at 20-21). These guidelines explain that the moment of silence serves three separate and independent purposes: (1) to encourage thoughtful contemplation at the start of the school day; (2) to promote patriotism by providing for quiet meditation immediately following recitation of the pledges of allegiance; and (3) to protect individual religious freedom.

> I know right now we have permissive language but I was, came across numerous examples of schools where this was not taking place and I had assumed otherwise before I thought about the bill.

Statement of Rep. Branch, *Hearings on Tex. H.B. 793 Before the House Comm. on Pub. Educ.*, 78th Leg., (Apr. 1, 2003) (audiotapes available from House Video/Audio Services Office) (App. at 9).

ARGUMENT

I. MOMENT-OF-SILENCE STATUTES ARE NOT *PER SE* UNCONSTITUTIONAL.

The Crofts' first argument—that all moment-of-silence statutes are patently unconstitutional—directly contradicts Supreme Court precedent. In *Wallace v. Jaffree*, for example, the plurality explicitly acknowledged that "merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day" could be constitutional. 472 U.S. 38, 59 (1985). And Justice O'Connor's concurrence in that same case drew a sharp distinction between a religious and a religion-neutral moment of silence:

> First, a moment of silence is not inherently religious. Silence, unlike prayer or Bible reading, need not be associated with a religious exercise. Second, a pupil who participates in a moment of silence need not compromise his or her beliefs. During a moment of silence, a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others. . . . It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren.

Id., at 72-73. Thus, *Wallace*, the United States Supreme Court's only express statement on moments of silence, not only fails to support the Crofts' contention, but commands the opposite conclusion.[3]

3. *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981), is not to the contrary. There, a school district gave students the opportunity to participate in a voluntary collective prayer led by student volunteers or a classroom teacher. *Id.* at 899. Oral prayer, according to *Karen B.,* "is perhaps the quintessential religious practice for most of the world's faiths," *id,* at 901, but oral prayer is not at issue here. Indeed, even if students choose to use their minute for silent prayer, and even if the Legislature foresaw that such a use of the minute could occur, an intent to facilitate meditation, reflection, prayer, and other *silent* activities is not an intent, as in *Treen*, that teachers lead students (or lead students leading each other) in an oral collective prayer.

II. THE TEXAS MINUTE-OF-SILENCE STATUTE SATISFIES THE ESTABLISHMENT CLAUSE WITH THREE LEGITIMATE SECULAR PURPOSES.

Under current Supreme Court precedent, a statute must have a secular purpose to survive an Establishment Clause challenge.[4] This requirement comes from the tripartite test enunciated in *Lemon v. Kurtzman*: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." 403 U.S. at 612 (internal citations omitted).[5] Only secular purpose is at issue here. Neither the complaint nor the Motion for Partial Summary Judgment has argued that the statute has an effect that advances or inhibits religion or that the statute fosters an excessive government entanglement with religion.[6]

The Supreme Court recently reiterated the importance of the purpose prong: "When the government acts with the ostensible and predominant purpose of advancing religion, it violates the central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." *McCreary County v. ACLU,* 125 S. Ct. 2722, 2733

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4. The Establishment Clause reads: "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST., amend. I.

5. The continued validity of the oft-maligned *Lemon* test is somewhat in question. *See, e.g., Van Orden v. Perry,* 125 S. Ct. 2854, 2860-61 (2005) (declining to apply *Lemon* to determine the constitutionality of passive monuments and noting the irregularity with which the Court uses this test). We assume *arguendo* that the purpose prong applies here.

6. The Crofts' sparse allegations supporting their as-applied challenge are irrelevant to their facial challenge and insufficient to support an as-applied challenge. *See infra*, Part IV.C.

(2005).[7] Here, the State has three separate and distinct secular purposes, each of which independently satisfies *Lemon's* first prong.[8]

A. A Single Legitimate Secular Purpose Suffices to Satisfy the Establishment Clause.

As the Supreme Court has repeatedly emphasized, a plaintiff may not prevail on purpose grounds unless he demonstrates that the challenged statute was "motivated *wholly* by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (emphasis added). And, he must show that those considerations were constitutionally impermissible. A government's purpose need not "be unrelated to religion—that would amount to a requirement that the government show a callous indifference to religious groups, and the Establishment Clause has never been so interpreted." *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987) (internal citation omitted). Instead, the Court's purpose test "aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Id.* In short, the movant must demonstrate that the State's actual purpose in adopting the moment of silence was religious. *See Wallace*, 472 U.S., at 56 ("[A] statute that is motivated in part by a religious purpose may survive

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7. For the purpose of preserving the argument, the State notes here that it disagrees with *McCreary*'s view of the role of secular purpose in Establishment Clause jurisprudence. *McCreary* states that "the purpose apparent from government action can have an impact more significant than the result expressly decreed," in that a law with a secular effect motivated entirely by religion may be unconstitutional, while a law with a religious effect may be constitutional if maintained on secular grounds. *Id*, at 2733 (citing *McGowan v. Maryland*, 366 U.S. 420 (1961) for the proposition that Sunday closing laws were constitutional when the religious purpose had been abandoned and the law had a secular effect). The State believes that an otherwise constitutional State action should not be invalidated merely because of its "unconstitutional" religious motivation.

8. The change from a permissive to mandatory period of silence has no constitutional relevance. *See Wallace,* 472 U.S. at 58-59; *May v. Cooperman*, 780 F.2d 240, 253 (3d Cir. 1985).

the first criterion [of *Lemon*], [but] the First Amendment requires that a statute must be invalidated if it is *entirely* motivated by a purpose to advance religion."); *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) (emphasis added).

The State, on the other hand, needs only a single legitimate secular purpose for the display to satisfy this requirement. *See Lynch*, 465 U.S. at 681 n.6. The Court's inquiry into the State's purposes is by design deferential and limited, *see Wallace*, 472 U.S. at 74-75 (O'Connor, J., concurring in the judgment), and the Court is reluctant to attribute unconstitutional motives to the State, *see Mueller v. Allen*, 463 U.S. 388, 394-95 (1983). Even in the absence of any expressed secular purpose, the State should not be deemed to have acted with an improper purpose unless "it is beyond purview that endorsement of religion or a religious belief 'was and is the law's reason for existence.'" *Wallace*, 472 U.S. at 75 (O'Connor, J., concurring in the judgment) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 108 (1968)); *see also McCreary,* 125 S. Ct. at 2735-36 (noting the government's obligation to articulate a sincere, rather than a sham, purpose); *Stone v. Graham*, 449 U.S. 39 (1980) (declaring a Ten Commandments display unconstitutional where the Court found the State's proffered secular purpose a sham and the real purpose wholly religious). Unless the court determines that each and every secular purpose the State puts forth to support a challenged statute is a sham, the statute clears *Lemon*'s first hurdle.

Indeed, even if one or two legislators individually suggested a religious motivation for the statute on their part, that would not support imputing such motivation to the entire assembly. "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." *United States v. O'Brien,* 391 U.S. 367, 384 (1968). Here, the bill sponsors, Sen. Wentworth and Rep. Branch,

articulated several legitimate secular purposes for enacting the statute, and that is all that is required under *Lemon*.[9]

B. Texas's Minute-of-Silence Statute Has Three Valid Secular Purposes

The Supreme Court has considered a statute requiring a moment of silence in public school classrooms only once—in *Wallace v. Jaffree.* In that case, the Court concluded that there was *no* secular purpose. 472 U.S. at 56-57. The statute at issue in *Wallace,* like the statute here, amended a previous statute authorizing "meditation" to add "or voluntary prayer." *Id.* at 58. The bill sponsor for the first statute in *Wallace* both inserted into the legislative record and testified before the district court that his purpose was "an 'effort to return voluntary prayer' to the public schools." *Id.* at 57. "In response to the question whether he had any purpose for the legislation other than returning voluntary prayer to public schools, he stated 'No, I did not have any other purpose in mind.'" *Id.* There was no additional legislative history to contradict that purpose when the statute was amended. *Id.* at 59-60. With only the *unrebutted* purpose to encourage voluntary prayer on record, the Supreme Court found that the lack of *any* secular purpose rendered the statute unconstitutional. *Id.* at 61.[10]

The Texas statute, by contrast, is supported by three independent secular purposes. As stated in the TEA's Guidelines, the purpose of the statute is threefold: (1) to encourage thoughtful

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9. Evidence that reveals both a religious and a secular purpose will not render the statute unconstitutional. As the Supreme Court has emphasized, "a statute that is motivated in part by a religious purpose may satisfy the first criterion [of *Lemon*] . . . ." *Wallace*, 472 U.S. at 56.

10. Moreover, the *Wallace* plaintiffs alleged that "teachers had 'on a daily basis' led their classes in saying certain prayers in unison." 472 U.S. at 42. The Crofts have made no such allegation here, and there is no suggestion that Texas teachers routinely ignore both the express statutory prohibitions on so doing and the clear TEA guidelines prohibiting teacher-led oral prayers.

contemplation; (2) to promote patriotism by providing for quiet meditation immediately following recitation of the pledges of allegiance; and (3) to protect individual religious freedom. (App. at 20). Any one of these sincere, legitimate purposes undergirding the statute would suffice to uphold its constitutionality. And, under the Court's precedents, the Crofts have the burden to prove that the State's exclusive purpose was religious promotion, whereas the State has no burden to prove that its exclusive purpose was secular. The Crofts have not met their burden.

1. Encouraging Thoughtful Contemplation Is a Legitimate Secular Purpose.

The TEA Guidelines described the first purpose of the statute as encouraging thoughtful contemplation:

> By beginning each day with a moment of quiet contemplation, the statute promotes a sense of calm and civility among the schoolchildren. That calm moment can then enhance concentration, allow students to peacefully collect their thoughts, and serve to decrease student stress. Particularly in this age where students are confronted regularly with images of violence and disorder, a quiet moment underscores the importance of the learning process on which the students are about to embark by adding an air of solemnity, which can also foster classroom discipline.

TEA Guidelines, at 1 (App. at 20). Similarly, Representative Branch noted that "[t]he primary purpose of S.B. 83 is to promote the core values of patriotism and establish a contemplative period that underscores the seriousness of the education endeavor" and that the bill "sets up a tone of seriousness, and I think will make our school institutions more reflective and more reverent." Debate on Tex. S.B. 83 on the Floor of the House, 78th Leg., R.S. (May 5, 2003) (Statement of Rep. Branch) (audiotapes available from House Video/Audio Services Office) (App. at 16).

Dr. William Bennett, former U.S. Secretary of Education and noted author, testified on behalf of the bill:

> This bill is about civic literacy, which is in pretty short supply . . . . The minute of silence suggests a tone of seriousness. It underscores the importance of the activity on which you are about to embark. This bill will make our schools more reverent institutions.

House Public Education Committee Passes Rep. Branch's Pledges, Minute of Silence Bill (Apr. 1, 2003) (http://www.house.state.tx.us/news/release.php?id=213) (App. at 27).

A period of thoughtful contemplation—even if some students individually choose to use that time for silent prayer—serves the purely secular ends of fostering discipline and helping students to focus for the day. Indeed, both the Fourth and Eleventh Circuits have upheld moment-of-silence statutes with precisely these purposes. *See Brown v. Gilmore*, 258 F.3d 265, 276 (4th Cir. 2001), *cert. denied*, 533 U.S. 1301 (2001) (upholding the constitutionality of a substantially similar statute with a legislative history indicating that student focus and discipline were key goals in its enactment); *Bown v. Gwinnett County Sch. Dist.,* 112 F.3d 1464, 1469 (11th Cir. 1997) (finding a secular purpose in "provid[ing] students with an opportunity for a brief period of quiet reflection before beginning the day's activities").

In *Brown v. Gilmore,* the Fourth Circuit considered a statute establishing a "'minute of silence' so that 'each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice.' Va. Code Ann. § 22.1-203 (Michie 2000)." 258 F.3d at 270. Sen. Wentworth intentionally and explicitly modeled Tex. S.B. 83 on this statute. *See Hearings on Tex. S.B. 83 Before the Senate Comm. on Educ.*, 78th Leg., R.S. (Feb. 11, 2003) (statement of Sen.

Wentworth) (audiotapes available from Senate Staff Services Office) (App. at 6). The Virginia statute, like the Texas one, created a neutral space for thoughtful contemplation in which prayer may occur, but only as a result of individual private choices of students. That bill was introduced to calm students and "somehow lessen the urges of students to resort to violence." *Brown,* at 271. Virginia Governor Gilmore "stat[ed] it would 'restore a sense of calm and civility in public schools by offering students a peaceful minute each day to reflect upon their studies, to collect their thoughts, or, if they so choose, to bow their heads and pray.'" *Id.* at 272. Similarly, the TEA Guidelines indicate that a moment of thoughtful contemplation is helpful "in this age where students are confronted regularly with images of violence and disorder." TEA Guidelines, at 1 (App. at 20).

The Fourth Circuit rightly found that the Virginia statute—which, like the Texas statute, explicitly mentioned prayer as an acceptable use of the statutory neutral silence moment—was facially constitutional. *Brown,* at 276. There, as here, the stated purposes allowed both religious and nonreligious activity so long the students were silent and not distracting to others. *See id.* An intent to encourage students to pause, compose themselves, and prepare for the day ahead suffices to satisfy *Lemon's* secular purpose requirement. *Id.*

Similarly, in *Bown v. Gwinnett County Sch. Dist.,* the court found a secular purpose in Georgia's Moment of Quiet Reflection in Schools Act, which—like the Texas statute—was intended "as an opportunity for a moment of silent reflection on the anticipated activities of the day. O.C.G.A. § 20-2-1050(b) (1996)." As in both Virginia and Texas, the Georgia law's sponsor indicated an intent to "combat violence among Georgia's students." *Bown,* 112 F.3d at 1467. The *Bown* court concluded that an intent to establish a moment of silent reflection—neither advocating,

nor preventing prayer—"does not affirmatively authorize any activity at all, but rather merely rebuts any possible negative pregnant implied from the prohibition of religious activity . . . ." *Id.* at 1470.

Nor did the fact that some individual legislators supporting the Georgia bill wanted to reinstitute school prayer render the entire purpose religious. Some legislators may have had an impermissible purpose, but "'[e]ven if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law.'" *Id.* at 1471-72 (quoting *Bd. of Educ. of Westside Cmty. Schs. v. Mergens,* 496 U.S. 226, 249 (1990)) (emphasis in original). *Bown* teaches that the proper inquiry centers on the purpose of the Legislature as a whole, not the stray remarks of individuals.

Instituting a moment of thoughtful contemplation to settle students, combat violence, aid discipline, facilitate parental value teaching, and lend an air of gravity to the educational process has a plainly secular purpose that has been repeatedly upheld as constitutional. This purpose alone would survive constitutional scrutiny.

2. Promoting Patriotism Is a Legitimate Secular Purpose.

Both the bill sponsors and the TEA Guidelines indicate that promoting patriotism was an additional purpose of the bill. Indeed, as the TEA Guidelines state,

> [q]uietly contemplating our nation's heritage, and the lives of the men and women who have died to ensure our liberty, in turn promotes patriotism, which is a longstanding objective of the Texas curriculum. Thus, Texas Education Code §28.002(h) provides that "[a] primary purpose of the public school curriculum is to prepare thoughtful, active citizens who understand the importance of patriotism and can function productively in a free enterprise society with appreciation for the basic democratic values of our state and national heritage."

TEA Guidelines, at 1 (App. 20).

Rep. Branch explained that,

> [a]s Texans, we live in a unique state and are part of a special nation . . . . There is great value in remembering the sacrifices that allow us to live in freedom—sacrifices that continue to this very hour. This bill would create daily opportunities for students to consider the state and nation in which they live. . . . Many members of this Legislature recognize that principles of respect and gratitude for state and nation should endure . . . . This bill ensures the passage of these core values to succeeding generations.

House Pub. Educ. Comm. Passes Rep. Branch's Pledges, Minute of Silence Bill, (App. at 27).

Elsewhere, he explained the purpose of the bill thusly:

> This legislation reminds students that they reside in the beacon state of a blessed union. Throughout generations, Americans and Texans have sacrificed greatly, often completely, to lay the foundation upon which our nation and state now stand. This legislation invites our children to remember that crowd of witnesses and to join in their story.
>
> The minute of silence facet of the legislation creates a vacuum period into which parents can pour their values of choice.

Dan Branch, *Pledge, Minute of Silence Legislation Sets Forth Core Values,* DALLAS NEWS.COM, July 4, 2003, http://www.danbranch.com/media/DallasMorningNews/dmn-070403.htm. (App. at 29).

Senator Wentworth also cited patriotism as a purpose for the bill: "Do we need this bill. In order to inculcate patriotism and love of country and loyalty to our students, I believe it would be helpful." Debate on Tex. S.B. 83 on the Floor of the House, 78th Leg., R.S. (May 5, 2003) (audiotapes available from House Video/Audio Services Office) (App. at 14). Similarly, Senator Lucio cited patriotism as a key purpose—"to be thankful that they [students] live in the greatest country in the world"—in addition to protecting religious freedom. *Id.* (App. at 15).

The Supreme Court has indicated that patriotism is indisputably secular. *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 31 (2004) (Rehnquist, C.J., dissenting) ("Reciting the

Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church."); *see also, e.g., County of Allegheny v. ACLU,* 492 U.S. 573, 631 (1989) (O'Connor, J., concurring) (noting that Thanksgiving is secular rather than religious because it "is now generally understood as a celebration of patriotic values"); *Lynch*, 465 U.S. at 711 n.16, (Brennan, J., dissenting) (noting that Christmas keeps company with such "patently secular, patriotic" holidays as the Fourth of July and Memorial Day); *Sch. Dist. of Abington v. Schempp,* 374 U.S. 203, 241-42 (1963) (Brennan, J., concurring) ("It is implicit in the history and character of American public education that the public schools serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort–an atmosphere in which children may assimilate a heritage common to all American groups and religions. This is a heritage neither theistic nor atheistic, but simply civic and patriotic.") (internal citation omitted).

A minute of silence following the recitation of the pledges—the quintessential act of patriotism—gives students the opportunity to remember those who have died for our country. Observing a moment of silence in remembrance of fallen heroes or victims of tragedy is a traditional custom in the United States. *See Mourning*, WIKIPEDIA, http://en.wikipedia.org/wiki/Mourning (last visited Oct. 16, 2006) (App. at 31); *see also* S. Con. Res. 100, page S. 1914 (March 29, 2000) (App. at 39-40) (advocating a national moment of remembrance to be observed at 3:00 p.m. EST each Memorial Day); Jennifer Loven, *Bush Joins in 9/11 Moment of Silence,* ABC NEWS, Sept. 11, 2006, http://abcnews.go.com/Politics/wireStory?id=2419116&page=1 (App. at 41-42) (describing the national moment of silence to commemorate the victims of the 9/11 terrorist attacks).

To "solemnize public occasions, express confidence in the future, and encourage the recognition of what is worthy of appreciation in society" is yet another legitimate secular purpose. *County of Allegheny,* 492 U.S. at 625 (O'Connor, J., concurring in part and concurring in the judgment); *see also Chaudhuri v. Tennessee*, 130 F.3d 232, 236-37 (6th Cir. 1997) (upholding a moment of silence "instituted . . . to 'afford dignity and formality to [an] event . . . and to solemnize [an] occasion'").[11] This statute, according to both the bill sponsor and to expert witness Dr. Bennett, does precisely that. It "communicates the importance of the education endeavor, an element that has been sorely missed in certain schools." Branch, *Pledge, supra,* at 1 (App. at 29). Indeed, Rep. Branch reports his experience that "[t]eachers and parents have applauded the period of calm in an otherwise busy school day." *Id.*

Thus, an effort to instill a sense of patriotism and solemnize the beginning of each day is also a secular purpose. This purpose, too, would individually be enough to withstand *Lemon*'s scrutiny.

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11. Even though the Supreme Court in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 306-07 (2000) rejected "solemnizing" a football game as a proper purpose for opening with a student-led prayer, it did so on the ground that the solemnization was audibly religious and that religious message bore the imprimatur of the school district. *See id.* Critical to the analysis was the district's approval of only one type of message. *See id.* at 309. The Texas minute-of-silence statute, by contrast, plainly admits as many messages as there are students observing it.

For this same reason, the Texas statute presents no risk of coercion or religious divisiveness. *Cf. Lee v. Weisman*, 505 U.S. 577, 587-90 (1992) (finding a clergy-led, orally-delivered school graduation prayer unconstitutional because it had the effect of coercing nonadherents to participate, which could lead to divisiveness). Because students are free to do any silent activity they choose, they are not coerced into any religious exercise. And because students may not do anything that distracts others, the silent minute is not divisive. Nor does it promote "religious gerrymanders." *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 534 (1993). No one need know whether the student on his left is praying or the student on his right is contemplating Nietsche. To the outward observer, all are engaged in precisely the same activity: silence.

3. Protecting Individual Religious Freedom Is a Legitimate Secular Purpose.

Texas law protects the individual religious liberty and freedom of conscience of every Texas child. TEX. EDUC. CODE §25.901 explicitly provides that "A public school student has an absolute right to individually, voluntarily, and silently pray or meditate in school in a manner that does not disrupt the instructional or other activities of the school. A person may not require, encourage, or coerce a student to engage in or refrain from such prayer or meditation during any school activity." Mentioning prayer as one example of acceptable silent, non-distracting activity simply ensures that §25.901's protection of individual religious freedom carries over into the minute of silence. As the TEA Guidelines explain,

> [prayer's] inclusion as one of the permissible options reflects the State's neutrality towards prayer; indeed, to deliberately exclude prayer from the specified options permissible during this time of silence would reflect a hostility to religious faith that is incompatible with the U.S. and Texas Constitution's protections of religious liberty.

TEA Guidelines, at 2 (App. 20).

Protecting individual religious freedom is a legitimate secular purpose.[12] As Justice Brennan, one of the staunchest advocates of strict separation between church and state, once wrote, "the observance of a moment of reverent silence at the opening of the class [may serve] the solely secular purposes of devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government." *Abington,* 374 U.S. at 281 (Brennan, J., concurring) (quoted in *Wallace,* 472 U.S. at 62 n.2 (Powell, J., concurring)).

The predecessor moment-of-silence statute specified two options as permissible during the moment of silence: "reflect or meditate." Act of May 27, 1995, 74th Leg., R.S., ch. 260, § 1, 1995 Tex. Gen. Laws 2207 (App. at 4). Although Education Code §25.901 separately protected students' right to pray, the omission of "prayer" from the 1995 statute was not inadvertent. Nor would anyone

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12. To be sure, *Wallace* rejected the State of Alabama's proffered purpose of "accommodation" in including the words "voluntary prayer" as purely religious; however, it did so on the grounds that this stated purpose was essentially a sham—"accommodation" implies the lifting of a burden on religion, and the Court determined that in Alabama there was no burden to lift. *See Wallace,* 472 U.S. at 57 n.45.

In Texas, there was no impermissible purpose tainting the Legislature's action as there was in Alabama, and the Texas statute's purpose was not "accommodation," but rather protecting individual religious liberty by making clear that prayer need not be excluded from each student's personal choice for their moment of silence. Thus, the Texas statute promotes constitutional religious neutrality because both its intent and effect are to establish a silent forum for mental speech—it facilitates private religious and nonreligious thought without any official comment on those thoughts. It does not favor some views over others. *See Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 828 (1995) (quoting *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)) ("In the realm of private speech or expression, government regulation may not favor one speaker over another."). And the statute "respects the critical difference 'between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'" *Rosenberger,* 515 U.S. at 841 (quoting *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)). Indeed, the Legislature's inclusion of prayer as one of many acceptable options during the minute of silence can be said to "follow[] the best of our traditions," as the Supreme Court has found "no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." *Zorach v. Clauson,* 343 U.S. 306, 313-14 (1952).

reading that statute believe that the omission was accidental. To the contrary, administrators, superintendents, teachers, parents, and students could all read that omission as a deliberate and not terribly subtle indication that prayer was a disfavored activity, standing on a lesser constitutional footing that secular meditation and reflection. That reading, in turn, manifests precisely "the 'callous indifference' [that the Supreme Court has] said was never intended by the Establishment Clause." *Lynch*, 465 U.S. at 673. Nothing in the First Amendment supports"establish[ing] a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion." *Abington,* 374 U.S. at 225.

By acting in 2003 to correct that omission, the Legislature was exceedingly careful to avoid endorsing prayer. Rather, the Legislature acted to remove any possible impression that individual silent prayer was disfavored and should discouraged by school officials. Indeed, Justice Stevens, writing for the *Wallace* Court, expressly recognized that a "legislative intent to return prayer to the public schools is, of course, quite different from merely *protecting every student's right to engage in voluntary prayer during an appropriate moment of silence* during the school day." *Wallace,* 472 U.S. at 58 (emphasis added). The 2003 statute offers exactly the protection Justice Stevens countenanced: By ensuring that prayer is a permitted activity during the minute of silence, it offers students an opportunity to exercise their right under §25.901 at a time that would not disrupt classroom instruction.

The United States Supreme Court has repeatedly held that governmental acknowledgments of the religion of its citizens are constitutional. Indeed, there is "an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S., at 674. The Court has observed, "religion has been closely

identified with our history and government," *Abington*, 374 U.S. at 212; the "history of man is inseparable from the history of religion," *Engel v. Vitale*, 370 U.S. 421, 434 (1962); and we "are a religious people whose institutions presuppose a Supreme Being," *Zorach*, 343 U.S. at 313. Nothing in the Constitution "impose[s] a prohibition on all religious activity in our public schools." *Santa Fe Indep. Sch. Dist.,* 530 U.S. at 313. Government "need not resign itself to ineffectual diffidence because of exaggerated fears of contagion of or by religion, so long as neither intrudes unduly into the affairs of the other." *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 10 (1989) (plurality opinion). To do otherwise would entrench the "hostility to religion" that the Supreme Court has repeatedly said finds no place in our Constitution. *Abington,* 374 U.S. at 225.

C. The Articulated Secular Purposes Are Sincere, Not Shams.

Faced with the evidence of three legitimate secular purposes, the plaintiffs are reduced to arguing that these purposes are mere facades or shams. First, including the word "pray" in the list of permissible activities does not strip that period of its secular purpose. As Justice O'Connor's concurrence in *Wallace* expressly noted,

> "*[e]ven if a* ***statute specifies*** *that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer* over other specified alternatives."

Wallace, 472 U.S. at 73 (O'Connor, J., concurring) (emphases added). Where courts have found unconstitutional minute-of-silence statutes whose language contains a specific reference to prayer, they have reached that conclusion based on the statute's broader legislative history. *See Wallace,* 472 U.S. at 57-58 (indicating the bill sponsor's intent to promote prayer in a version of a moment-of-silence statute); *May v. Cooperman*, 780 F.2d 240, 251-52 (3d Cir. 1985) (noting the history of "other less facially neutral efforts to return prayer to the public schools; in particular the previous

activities of one sponsor of the instant litigation"). The Texas statute has no such tainted history. The bill sponsors of the 2003 statute expressly disclaimed any intent to pass a prayer bill, and the 1995 law was only intended to clarify and facilitate the exercise of existing constitutional rights. *See* Statement of Legislative Intent, H.J. OF TEX., 74th Leg., R.S. 4349 (1995) (App. at 44-45).

Second, the Crofts suggest that because a majority of Americans, and Texans, are Christian, the Legislature had no need to explain that prayer was an acceptable choice; thus, prayer's unnecessary mention indicates a desire to promote it. Even assuming *arguendo* that Plaintiffs' unsubstantiated speculation as to the inner spiritual lives of the majority of American people is true, the Legislature had firm grounds for believing that explicitly including prayer was necessary to ensure that it would be permitted.

Courts around the country have heard cases involving efforts by individual schools to discriminate against religious expression. Although the Constitution mandates neutrality toward religion once a public school creates a forum for expression, *e.g., Rosenberger v. Rector and Visitors of University of Va.*, 515 U.S. 819, 835 (1995) (finding unconstitutional the state's exclusion of religious publications from a general funding of student publications), in instances in which courts have declined to find such a forum, they have on some occasions upheld the exclusion of religion. *See, e.g., Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1217 (11th Cir. 2004) (upholding a public school's decision to ban religious symbols and language from a student's contribution to a school mural); *Walz v. Egg Harbor Twp. Bd. of Educ.,* 342 F.3d 271, 281 (3d. Cir. 2003) (upholding school's restriction on student's distribution of holiday candy with religious messages); *C.H. v. Olivia*, 226 F.3d 198 (3d Cir. 2000) (en banc) (affirming dismissal of charges against school for allegedly removing a kindergartner's picture of Jesus from a group artwork display

because of its religious theme); *Doe v. Beaumont Indep. Sch. Dist.,* 240 F.3d 462, 473 (5th Cir. 2001) (en banc) (finding plaintiffs had standing to challenge a "Clergy in Schools" program in which volunteer clergy counseled students in schools and remanding for trial); *Campbell v. St. Tammany Parish Sch. Bd.,* 231 F.3d 937, 945 (5th Cir. 2000) (denial of rehearing en banc) (upholding a public school's right to exclude religious services from a limited public forum in its facilities). Given this trend, the Legislature could reasonably fear that school officials might treat prayer as a disfavored option.

Indeed, the Statement of Intent in the 1995 period-of-silence bill reflects just such a concern:

> Chisum: . . . [W]hen you say a student in public school has an absolute, individual right to individual, voluntary, and silent prayer and meditation in school . . . you do not intend that group prayer that is initiated by a student to be prohibited is that correct?
>
> Sadler: I do not.
>
> Chisum: OK. So prayer around the flagpole initiated by students alone is certainly not your intent to prohibit?
>
> Sadler: It is not . . . .
>
> . . .
>
> Chisum: So it's your intent that the school should not encourage nor discourage prayer in any manner?
>
> Sadler: That is correct.

H.J. OF TEX., 74th Leg., R.S. at 4349 (1995) (App. at 45). The legislators felt a need to create a record that indicated their intent that protecting silent prayer would not accidentally convey the message that student-initiated, student-led group prayers were prohibited. According to religious liberties scholar Douglas Laycock, quoted in a contemporaneous *Austin American Statesman* article,

the period of silence "could further confuse educators. . . . Teachers could be accused of discouraging prayer if they bent over backward to be neutral on the moment of silence . . . ." A. Phillips Brooks, *Legislation Attempts to Clarify School Prayer*, AUSTIN AM. STATESMAN, Jun. 7, 1995 (App. at 46).

Similarly, the inclusion of the word "pray" in the 2003 statute prevented school officials from reading the deliberate omission of "prayer" as an indication that prayer was verboten, disfavored, or simply something to be avoided in public schools. For legislators to bend over backwards to exclude prayer from the natural lists of options available for individual student choice during a moment of silence—or for federal courts to order that the word "prayer" be excised from those permissible options—sends the unmistakable signal that individual, self-initiated, silent student prayer is somehow improper in public schools, that prayer is in effect "radioactive." That is emphatically not what the Constitution requires.

Moreover, the TEA Guidelines are unmistakably clear that school officials must remain neutral, that they can in no way encourage or discourage silent student prayer:

> In accordance with these statutory directives, *teachers and administrators should neither encourage nor discourage students from choosing on their own to pray during this moment of silence.* Any prayer, however, must be silent. Neither students nor teachers may pray, meditate, or reflect audibly during the moment of silence. Not only would outloud prayer violate the statutory mandate that students must remain *silent*, but it might also have the improper effect of coercing others to join in a group exercise. The moment of silence is not to be conducted as a religious service or exercise; rather, it is simply an opportunity for quiet reflection.
>
> Teachers and administrators should not exhort students to pray, favor students who pray, or disfavor students who do not pray. Neither should teachers discourage students from praying, favor students who do not pray, or disfavor students who do pray. Each individual student must choose, without pressure from peers, superiors,

> or government, how to use this time meaningfully in a way that accords with the statute and with his or her values.

TEA Guidelines, at 2 (App. 21) (first emphasis added).

In an abundance of caution, the Guidelines further specify, "[u]nder no circumstances should a teacher begin the moment of silence with phrases such as 'let us pray,' end the moment with phrases such as 'amen,' or solicit prayer requests before the moment of silence." *Id.* at 2 n.1. Finally, the Guidelines highlight the constitutional concerns and explicitly advise school officials to avoid any conduct that might raise Establishment Clause concerns:

> The Supreme Court of the United States has held that coercing students to pray is unconstitutional. *See Lee v. Weisman*, 505 U.S. 577 (1993) (finding that a graduation prayer was unconstitutional because it was directed by state officials and students were for all intents and purposes obligated to participate); *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) (finding a practice of voiced student-led, student-initiated prayer before football games unconstitutional because the prayer occurred pursuant to a school policy explicitly encouraging public prayer and because participation in that religious ritual had a coercive effect on the students). *Thus, it is critically important that teachers and administrators follow these guidelines to ensure that students do not feel any pressure to use the moment of silence in a religious manner.* Just as importantly, however, teachers and administrators should not do anything to indicate that a religious use of the moment of silence would be inappropriate. The Constitution requires that public schools maintain neutrality toward religion.

Id. at 2 n.2 (emphasis added).

Given the facially neutral statutory text, the clear and explicit interpretive guidelines, the detailed protections against unconstitutional endorsement, and the multiple indicia of three separate secular purposes for the Legislature, the Texas minute-of-silence statute fully satisfies the *Lemon* test, and so the court should rule as a matter of law that it is entirely constitutional.

III. THE MINUTE-OF-SILENCE STATUTE PROMOTES CONSTITUTIONALLY MANDATED GOVERNMENTAL NEUTRALITY TOWARD RELIGION.

Neutrality has long been a fixed and constant star in the Court's jurisprudence addressing religious discrimination under the Establishment Clause, the Free Exercise Clause, the Equal Protection Clause, and the Free Speech Clause. These clauses—and the neutrality principle uniting them—converge in this case to demonstrate that Texas's minute-of-silence statute properly fosters neutrality toward religion. By including the word "pray" in the statute while clearly delineating that school personnel must administer the statute in a manner that is neutral toward religion, the State has struck the balance between preventing discrimination against religion and impermissibly advancing religion. The minute-of-silence statute constructs a religion-neutral space: It tolerates both the religious ends of those who wish to pray and the secular ends of those who do not. No legislative history and no statutory language change that result.

Indeed, the inclusion of "pray" merely makes explicit what must have been implicit before. It is beyond cavil that the statute would not have survived constitutional scrutiny had it provided that students "may reflect or meditate, but may in no circumstances pray silently." *See infra* Parts III.A-III.C. The Constitution would not countenance the explicit exclusion of prayer as a permissible student choice. And surely it cannot be unconstitutional to say explicitly what the Constitution already required implicitly—that students must remain free to choose to pray silently on their own.

A. The Religion Clauses Jointly and Severally Compel Neutrality.

The Supreme Court has most directly recognized the principle of governmental neutrality toward religion in the First Amendment's Free Exercise and Establishment Clauses. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion or prohibiting the

free exercise thereof . . . ."). These clauses jointly ensure religious liberty by mandating that the government can neither "impose special disabilities on the basis of religious views or status," *Employment Div., Dep't of Human Res. v. Smith,* 494 U.S. 872, 877 (1990), nor foster "bias or hostility to religion," *Rosenberger,* 515 U.S. at 846. As one First Amendment scholar has explained, although some perceive tension between the Free Exercise and Establishment Clauses, the two clauses are more appropriately viewed as "but two sides of the same coin" representing "a single value in our constitutional democracy—religious freedom." Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 313 (1986); *see also Larson v. Valente,* 456 U.S. 228, 245 (1982) ("Th[e] constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause. . . . Free exercise thus can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations."). Thus, a "proper respect for both the Free Exercise and the Establishment Clause compels the State to pursue a course of neutrality toward religion." *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973).

1. The Free Exercise Clause prevents unjustified hostility toward religion.

"The Free Exercise Clause protects religious observers against unequal treatment." *Lukumi,* 508 U.S. at 542 (citation omitted). Laws burdening religious practices must be neutral and of general applicability; otherwise, they must be narrowly tailored to advance "interests of the highest order," a "most rigorous" form of scrutiny that is satisfied "only in rare cases." *Id.* at 546. The minimum requirement of neutrality is that the law must not be facially discriminatory. *Id.* at 533.

In *Lukumi*, the Court unanimously struck down on Free Exercise grounds a group of municipal ordinances that sought to prevent the sacrifice of animals by practicioners of the Santeria religion. After examining those ordinances, the Court concluded that "religious practice [was] being singled out for discriminatory treatment." *Id.* at 538. Indeed, because the ordinances distinguished between identical conduct based solely on religious belief—prohibiting animal slaughter by religious believers but allowing it by secular operators—the Court concluded that they constituted a "religious gerrymander" and struck them down as an impermissible burden on Santeria practicioners' free exercise rights. *Id.* at 535-38.

Lukumi's principle here supports the inclusion of the word "pray" in the statute in the interest of preventing discrimination against religion. The City of Hialeah could not permit animal slaughter so long as it was not religious; likewise, Texas could not mandate a moment of silence that could only be nonreligious. To do otherwise would discriminate against otherwise permissible conduct—any silent activity—simply because of the religious motivation behind that conduct. Indeed, as the *Lukumi* Court explained, "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.* at 532; *see also McDaniel v. Paty,* 435 U.S. 618, 620, 629 (1978) (plurality op.); *id.* at 630-31 (Brennan, J., concurring) (invalidating on Free Exercise grounds a Tennessee law discriminating against religion generally by banning ministers or priests "of any denomination whatever" from serving as delegates to state constitutional conventions); *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (CA3 1999) (applying strict scrutiny and invalidating on Free Exercise grounds an exemption to a policy requiring police officers to shave that was granted for medical reasons but denied for religious reasons).

This principle is the obverse of the Court's holding in *Smith,* that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)). Just as the Free Exercise Clause does not give license for religious believers to disregard neutral and generally applicable laws, neither does it permit government to exclude religious believers from otherwise generally applicable programs.

Here, including "pray"as one example of permitted activity among many renders the statute facially neutral. To do otherwise would "impose special disabilities on the basis of religious views or status," *Smith*, 494 U.S. at 877, and the statute would not be entitled to *Smith*'s rational-basis deference. "Neutrality and general applicability are interrelated . . . . A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi,* 508 U.S. at 531-32. Setting prayer on equal footing with other secular uses of a silent minute is not only allowed, but required by the Constitution.

2. The Establishment Clause commands official neutrality toward religion.

The Establishment Clause both prevents official sponsorship of religion and prevents official discrimination against it. Indeed, the second prong of the *Lemon* test requires that a law's "principal or primary effect must be one that neither advances *nor inhibits* religion." 403 U.S. at 612 (emphasis added). If creating an incentive that favors religion would improperly "advance" religion, creating a disincentive would likewise unconstitutionally "inhibit" it. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2002) (noting that the Establishment Clause prevents states "from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion") (citation omitted). So long

as the minute of silence is neutral—between and among different religions, and between religion and nonreligion—the fact that, through the exercise of individual choice on the part of the individual student, the minute may be used for religious ends does not render the minute invalid.

The Court's Establishment Clause jurisprudence reflects a requirement of neutrality toward religion that exists in harmony with the neutrality commanded by the Free Exercise Clause. And a long line of Supreme Court cases makes clear that neutrality both satisfies and is required by the Establishment Clause. *See Zelman,* 536 U.S. at 653-54 (holding that the state's school-voucher program did not violate the Establishment Clause because it was "neutral in all respects toward religion," accomplished a secular purpose of providing educational assistance to a broad class of persons without regard to religion, and contained no financial incentives favoring religious schools over non-religious ones); *Mitchell v. Helms*, 530 U.S. 793, 808-11 (2000) (plurality op.) (upholding State's loan of non-religious educational materials to religious schools because the aid had valid secular purpose and was offered on religion-neutral basis to all schools); *Agostini v. Felton*, 521 U.S. 203, 234-35 (1997) (holding that provision of remedial instruction by government employees at sectarian schools did not violate Establishment Clause when provided to disadvantaged children on neutral basis pursuant to program containing safeguards preventing state-sponsored religious indoctrination).

Indeed, "the Establishment Clause forbids the government to use religion as a line-drawing criteria. In this respect, the Establishment Clause mirrors the Equal Protection Clause. Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-

drawing than for racial." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet,* 512 U.S. 687, 728 (1994) (Kennedy, J., concurring).

Line-drawing that excludes religious expression is essentially coercive, and this principle of coercion also links the Establishment Clause and the Free Exercise Clause. The Establishment Clause prevents the intentional coercion of nonadherents into a public religious exercise. *See Lee v. Weisman,* 505 U.S. 577 (1992) (holding a graduation prayer unconstitutional). Likewise, the Free Exercise Clause prohibits the targeted coercion of adherents into not practicing the tenets of their faith, *see Lukumi*, 508 U.S. at 533. The State of Texas prevents such coercion by simultaneously including prayer as one option in the statutory language yet preventing teachers and administrators from encouraging or discouraging it relative to other secular uses of the minute of silence.

Once the State establishes a minute of silence, categorically excluding prayer from it would be unconstitutional under either Free Exercise of Establishment Clause analysis. Its express inclusion merely codifies an existing constitutional protection.

B. The Equal Protection Clause Protects Religion from Categorical Exclusion.

The neutrality required under the Free Exercise and Establishment Clauses is closely related to the neutrality principles undergirding the Equal Protection Clause. "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, *religious*, sexual, or national class." *Miller v. Johnson,* 515 U.S. 900, 911 (1995) (emphasis added) (quoting *Metro Broad., Inc. v. FCC,* 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting), and *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris,* 463 U.S. 1073, 1083 (1983)). The anti-discrimination principle enshrined in the Religion Clauses is consonant with the Court's recognition that

classifications based on religion warrant strict scrutiny because the Equal Protection Clause forbids discrimination on the basis of a person's religious belief. *See Smith,* 494 U.S. at 886 n.3; *Burlington N. R.R. Co. v. Ford,* 504 U.S. 648, 651 (1992); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam).

The Supreme Court also has long recognized that equal protection principles apply at the convergence of free-speech and free-exercise rights. *See Niemotko v. Maryland*, 340 U.S. 268, 272 (1951) ("The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body."); *id.* at 284 (Frankfurter, J., concurring in the result) ("To allow expression of religious views by some and deny the same privilege to others merely because they are unpopular, even deeply so, is a denial of equal protection of the law forbidden by the Fourteenth Amendment."). For example, in *Police Department of Chicago v. Mosley,* the Court struck down a statute exempting peaceful labor picketing from a general prohibition on picketing next to a school, concluding that the need for content neutrality in a State's "time, place, and manner" regulations of speech involved an equal protection claim closely intertwined with First Amendment interests: "[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny its use to those wishing to express less favored or more controversial views . . . . There is an 'equality of status in the field of ideas.'" 408 U.S. 92, 95-96 (1972).

C. The Free Speech Clause Commands Viewpoint Neutrality.

The Equal Protection Clause's principle of neutrality toward religion also undergirds the forum cases decided in the Free Speech context. Indeed, the Supreme Court has repeatedly held that the Free Speech Clause forbids the exclusion of speakers or groups from a public forum or limited

public forum because of their religious messages. The forum cases, in turn reflect the neutrality principle underlying and emanating from the Equal Protection and Free Exercise inquiries.

The Free Speech Clause's prohibition on viewpoint neutrality reinforces and converges with the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause. The Court has repeatedly held that the Free Speech Clause forbids the exclusion of speakers or groups from a public forum or limited public forum because of their religious message. *See Good News Club v. Milford Cent. Sch.,* 533 U.S. 98, 120 (2001) (holding that public school's exclusion of Christian Bible Club from after-school community-use program based on club's religious nature constituted impermissible viewpoint discrimination); *Rosenberger*, 515 U.S. at 842-46 (holding that state university's refusal to fund student group's newspaper expressing Christian editorial viewpoint was viewpoint discrimination, and that funding newspaper as part of general, religion-neutral program funding various student groups did not violate the Establishment Clause); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.,* 508 U.S. 384, 390-96 (1993) (holding that exclusion of Christian-oriented film series from program allowing various groups to use school premises after hours constituted viewpoint discrimination, and rejecting argument that allowing films would violate Establishment Clause); *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (holding that state university could not deny student prayer and Bible-study group access to university facilities available to other student groups); *see also Bd. of Regents of Wis. v. Southworth,* 529 U.S. 217, 231 (2000) ("It infringes on the speech and beliefs of the individual to be required, by this mandatory student activity fee program, to pay subsidies for the objectionable speech of others without any recognition of the State's corresponding duty to him or her."). The same bedrock principle on which the forum cases' doctrine of viewpoint

neutrality rests also informs the doctrines governing the interpretation of the Establishment Clause, the Free Exercise Clause, and the Equal Protection Clause.

The Free Speech Clause does not allow a State creating a forum for expression—even silent expression—to engage in viewpoint discrimination. That clause requires "the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content." *Widmar,* 454 U.S. at 277. This scrutiny applied to restrictions on religious speech tracks that applied to other types of religious discrimination. The Court has recognized that complying with the Establishment Clause may be a compelling interest to satisfy that scrutiny. *Id.* at 271. It even held in *Rosenberger* that if funding of religious speech would not violate the Establishment Clause, fear of such violation could not excuse unconstitutional viewpoint discrimination. 515 U.S. at 845-46.

It is therefore unsurprising that the Court has looked repeatedly to its equal protection jurisprudence in assessing neutrality for purposes of both Free Exercise and Establishment Clause analysis. *See Lukumi,* 508 U.S. at 540 (applying equal protection principles to Free Exercise analysis) (citing *Walz*, 397 U.S. at 696 (opining that the Establishment Clause "*requires an equal protection mode of analysis.* The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.") (Harlan, J., concurring) (emphasis added)); *see also Lukumi,* 508 U.S. at 578 (Blackmun, J., concurring) (describing the *Smith* Court as "treat[ing] the Free Exercise Clause as no more than an antidiscrimination

principle").[13] Accordingly, the Equal Protection Clause serves as yet another source of the neutrality principle that forbids governmental discrimination against religious belief.

As the Court has stated, the "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger,* 515 U.S. at 839. Allowing Texas to use statutory language that merely reflects well-established constitutional principles will promote that diversity, respect the constitutional norm of neutrality, and prevent unconstitutional discrimination on the basis of religion.

IV. THE MINUTE OF SILENCE HAS A CONSTITUTIONAL EFFECT, EITHER UNDER COERCION OR ENDORSEMENT ANALYSES.

This case is a purpose case. If the court finds that the statute lacks a secular purpose, then the analysis ends, and Plaintiffs prevail. Likewise, if the court finds that the statute's purpose is not "wholly" religious, but rather that it has a sufficient secular purpose, then the analysis also largely ends. Plaintiffs have not made any serious argument that the statute has any unconstitutional effect or that it results in unconstitutional entanglement. Nor could they. The Supreme Court's precedents inexorably lead to the conclusion that a classroom of children, sitting silently for 60 seconds at the beginning of the day with no mention of God or religion or faith, cannot possibly have an

13. First Amendment scholars have applauded the equal-protection aspect of the Court's treatment of the Religion Clauses. *See, e.g.*, Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L., ETHICS & PUB. POL'Y 341, 365-72 (1999); Paulsen, *supra,* at 325 ("[T]he establishment clause is best understood as providing for the equal protection of the free exercise of religion."). That equal protection component can be recognized for its independent force or characterized as an aspect of incorporation, focusing like a lens the contours of the Religion Clauses. *See Recent Development: Animal Sacrifice and Equal Protection Free Exercise*, 17 HARV. J. L. & PUB. POL'Y 262 (1994); *cf.* Akhil Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131, 1136-37 & n.23 (1991).

impermissible effect. Accordingly, if the court rules for the State on purpose, the court should resolve the matter entirely and uphold the statute as a matter of law.

A. The Minute of Silence Coerces No One.

In cases involving oral prayer in public school settings, the Supreme Court has looked to the coercive effect of the practice to evaluate its constitutionality. The Court has found on two occasions, in *Santa Fe,* 530 U.S. 290 (involving student-led prayer at football games), and *Lee*, 505 U.S. 577 (involving clergy-led prayer at graduations), that oral, collective prayers had the unconstitutional effect of coercing nonadherents into a religious practice. *See Lee*, 505 U.S. at 598-99.

Critical to the analysis in each case was a determination that the challenged practice created "a state-sponsored and state-directed religious exercise in a public school." *Id.*, at 587. The Court has held that the Constitution does not allow the State to compose prayers, and in *Lee,* school officials provided clergy with explicit directions as to their preferred messages. *Id.* at 589-90. Similarly, in *Santa Fe,* the school district promulgated guidelines for the student-composed prayers and exercised control over its delivery. *Santa Fe,* 530 U.S. at 305-06.

Moreover, the Court concluded, participation in the challenged prayers in *Lee and Santa Fe* was not truly voluntary because graduation exercises and football games are such an important part of student life. *Lee,* 505 U.S. at 594-95; *Santa Fe,* 530 U.S. at 311-12. The minute of silence required by the Texas statute poses none of these concerns. First, the TEA Guidelines explicitly provide that teachers are not allowed to encourage or discourage silent student prayer, much less compose or lead oral prayers. TEA Guidelines, at 2 (App. 21). Indeed, under the statute, audible

prayers are not allowed by anybody. Second, because prayer is only one option among many, and no one knows what silent students are thinking, allowing a moment of silence cannot be coercive.

Correlative to the coercion analysis is the question of political divisiveness. Although "neither its existence nor its potential necessarily invalidates the State's attempts to accommodate religion in all cases," *Lee,* 505 U.S. at 587, political divisiveness poses a special concern where "subtle coercive pressures exist" to participate in an "overt religious exercise." *Id.* Again, where students are all quiet at once—and where school officials follow the TEA Guidelines—there is little danger that they will receive the divisive impression that meditating on Aristotle is superior to Augustine, or vice versa.

B. The Moment of Silence Neither Endorses Religion Nor Fosters Excessive Entanglement with Religion.

The second prong of the *Lemon* test requires that a law's "principal or primary effect must be one that neither advances nor inhibits religion." 403 U.S. at 612. The third requires that it not foster excessive governmental entanglement with religion. *Id.* In *Allegheny*, 492 U.S. 573 a plurality of the Court indicated that the first two prongs of *Lemon* informed a broader "endorsement" inquiry—that is, "whether the challenged governmental practice has the purpose or effect of 'endorsing' religion." *Id.* at 592-93. Indeed, in the prayer context, purpose plays a key role in that analysis. If the government has enacted a moment-of-silence statute "for the sole purpose of expressing the State's endorsement of prayer activities," it cannot stand. *Id.* (quoting *Wallace*, 472 U.S. at 60).

Here, the moment-of-silence statute has no impermissible purpose of endorsing religion for the reasons stated above. Likewise, it does not actually endorse religion. There is no message in a

moment of silence that treats secular and religious thought equally that "religion or a particular religious belief is favored or preferred." *Wallace,* 472 U.S. at 70 (O'Connor, J., concurring). Nor does the government "appear[] to take a position on questions of religious belief or . . . 'mak[e] adherence to a religion relevant in any way to a person's standing in the political community.'" *Allegheny,* 492 U.S. at 594 (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)).

Governmental endorsement of religion "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.*, at 595 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)). A minute of silence, by contrast, sends only the message that quiet contemplation is required—the content of that thought being left entirely to the individual. Again, because the TEA Guidelines prohibit any official comment favoring or disfavoring particular choices during that minute, TEA Guidelines, at 2 (App. 21), and because the statutory language makes clear that secular reflection and meditation stand on an equal footing with prayer, *see* TEX. EDUC. CODE §25.082(d) (App. 1), adherents to any or no philosophical viewpoint are treated identically under the law.

Moreover, because enforcement of the statute's directive to remain silent and not to distract others, *see id.*, is religion-neutral, the statute does not foster excessive entanglement with religion in violation of *Lemon*. *See* 402 U.S. at 612. Indeed, the TEA Guidelines expressly prohibit conduct that could entangle school officials in policing religious exercises—teachers may do nothing more than ensure that students remain quiet and nondistracting. *See* TEA Guidelines, at 2 (App. 21). This enforcement power does not facilitate religious practices over secular contemplation any more than monitoring the administration of a test promotes right answers over wrong ones.

C. Plaintiffs' Sole Fact Contention Is Irrelevant to Their As-Applied Challenge.

The only evidence the Crofts have presented in support of their as-applied challenge is a bare allegation that a single teacher may have once characterized the minute as a time for prayer. Complaint at 3, ¶9 (App. 24). The plaintiffs have not alleged that this remark was part of a statewide pattern or widespread practice, an allegation which, if proven, might well sustain an as-applied challenge. *Cf. Wallace*, 472 U.S. at 42 (noting that teachers were regularly leading students in collective prayer during the moment of silence). Instead, the entire basis for their as-applied challenge is a hearsay report concerning what this single teacher may perhaps have said "on at least one occasion." Complaint at 3, ¶9 (App. 24). The teacher's alleged statement, even if true and admissible, has no connection to the actual purpose behind the statute as a matter of law. Even assuming *arguendo* that Plaintiffs' allegation is true, and this one teacher once made this remark, it is irrelevant to their facial challenge and insufficient as a matter of law to support an as-applied challenge to this statute.

First, the alleged statement patently contradicts the statutory language. Section 25.082(d) plainly indicates that the minute of silence is not just about prayer, set aside only for prayer, but is a time of quiet reflection to be spent as the individual student chooses. And the TEA Guidelines further highlight the multiple secular legislative purposes. A single stray remark cannot supercede the codified implementation of the Legislature's intent.

Second, the statement was made by a single employee, not an official with state policy-making authority. This single teacher is not an authorized policymaker for the school district on minute-of-silence policy. *See Jett v. Dallas Indep. Sch. Dist.*, 7 F.3d 1241, 1245 (5th Cir. 1993) (holding that the board of trustees of a school district is the final policymaker). The Fifth Circuit has

held that stray statements about the purpose of legislation outside the official policymaking function will not be deemed to create a sham purpose. *Doe,* 240 F.3d at 468 (finding a superintendent's comments at church about a volunteer clergy counseling program in a public school not relevant to the determination of purpose).

Indeed, the TEA has promulgated guidelines clarifying a teacher's role as neutral arbiter of the silent minute: "Teachers and administrators should not exhort students to pray, favor students who pray, or disfavor students who do not pray. Neither should teachers discourage students from praying, favor students who do not pray, or disfavor students who do pray." TEA Guidelines, at 2 (App. 21).[14] Similarly, the TEA's Guidelines have cured any potential defect resulting from teacher misunderstandings and demonstrate the true secular goal of the actual policymakers. Thus, the teacher's alleged statement, even if true and admissible, has no connection to the actual purpose behind the statute. As a matter of law, one single statement, by one lone employee, cannot render a state statute unconstitutional, either facially or as applied—especially when the statement was contrary to the explicit statutory text and the subsequent interpretive Guidelines from the Texas Education Agency. For that reason, the court should deny Plaintiffs' Motion for Partial Summary Judgment and grant Defendant's Cross-Motion for Summary Judgment.

CONCLUSION AND PRAYER

For the foregoing reasons, Defendant Governor Rick Perry respectfully requests that this court deny Plaintiffs' Motion for Partial Summary Judgment and grant this Cross-Motion for Summary Judgment.

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14. The *Doe* court found that a subsequent clarification of the secular purposes of the program by the school district counteracted initial violations of the program's stated goal and ultimately upheld the purpose of the program at issue as secular. *Doe,* 240 F.3d at 468.

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to the Court's Electronic Filing Procedures, a true and correct copy of the foregoing document has been sent via Notice of Electronic Filing ("NEF") generated by the court's electronic filing system on October 17, 2006 to:

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